United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief for Appellants

IN THE UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

459

NORMAN PANNELL,

Appellant

v. No. 17,557

UNITED STATES OF AMERICA,

Appellee

VALERIA PANNELL,

Appellant

v. No. 17,558

UNITED STATES OF AMERICA,

Appellee

Appeal from Judgment of the United States
District Court for the District of Columbia

March 23, 1963

Robert B. Yorty
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Washington 6, D. C.

Counsel for Appellants
By Appointment of this Court

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QUESTIONS PRESENTED

1. Where appellants were joined with five co-defendants in unrelated Counts solely because of the presence of a conspiracy Count and where the government's case failed and where serious prejudice arose from the joinder, was not the trial court in error in denying appellants' motions for severance?
2. Where the testimony of the only government witness to the alleged narcotics transaction established that appellants at most were acting as the agents of the witness, was not the trial court in error in failing to set aside the verdicts as against the weight of the evidence?
3. Where the government agent's testimony failed to establish reasonable grounds to suspect appellants or to show a predisposition to commit the crimes charged; and where the agent admittedly was paid to "make" narcotics cases, was not the trial court in error when it denied appellants' motions for judgments of acquittal on grounds of entrapment?
4. When the government witness made non-responsive and prejudicial remarks relating to appellants, was not the trial court in error in failing to sustain appellants' objections and to grant a mistrial?

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*Cases or authorities chiefly relied upon are marked with asterisks.

OTHER AUTHORITIES

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JURISDICTIONAL STATEMENT

These appeals are from final judgments of conviction and sentences entered on December 13, 1962, by the United States District Court for the District of Columbia against appellants for violations of 26 U.S.C. §§ 4704(a), 4705(a) and 21 U.S.C. § 174. The District Court had jurisdiction pursuant to Title 11, Section 306, District of Columbia Code (1961 Ed.). This Court's jurisdiction is founded on Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

1. Procedural History

On April 2, 1962, appellants Norman and Valeria Pannell were charged along with Charles Matthews, Ellen Phelps, Roland Henry, Clintcn Johnson and Doris Gardiner in an indictment containing cne Count of conspiracy to violate the federal narcotics laws and twenty-one Counts of substantive violations of 26 U.S.C. §§ 4704(a), and 4705(a) and 21 U.S.C. § 174 (J.A. 1). Appellants were charged in Counts 8, 9 and 10 involving an alleged transaction on January 22, 1962. After trial by jury appellants were convicted on October 13, 1962, on these Counts; Charles Matthews was convicted on Counts 2, 3 and 4 and acquitted on Counts 5 through 22; Doris Gardiner was convicted on Counts 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19 20, 21 and 22 as charged. Verdicts of not guilty were entered as to all defendants on the conspiracy count, and as to Ellen Phelps and Roland Henry on all counts of substantive violations with which they were charged (J.A. 236, 237). Appellants were both sentenced on December 13, 1962, to serve terms of five years in prison (J.A. 239). Both appellants filed notices of appeal on December 13, 1962 (J.A. 240, 241). Leave to appeal in forma pauperis and a partial transcript were granted by the District Court. These appeals followed.

2. The Trial

The only witness called by the government with respect to Counts 8, 9 and 10 which involved the transactions of January 22, 1962, was agent Herman

H. Scott of the Federal Bureau of Narcotics. According to his testimony, the following events took place on that date:

At about 4:00 P.M. on January 22, agent Scott was at 1246 Holbrook Terrace, N.E., Apartment #1, in the District of Columbia (Tr. 423, J.A. 50). This was the address of one Estelle Murphy, a "special employee" with whom agent Scott worked on fifty per cent of his cases in the Washington, D. C. area (Tr. 424,452, J.A. 50, 61). During the period of Scott's association with Murphy he had occasion to deliver money to her about ten times in amounts ranging from a low of about $20.00 to the highest amount of $100.00 (Tr. 468, 469, J.A. 68).

At about 4:30 P.M. appellants Valeria and Norman Pannell arrived at the apartment (Tr. 424, J.A. 51). At first the Pannells were reluctant to discuss the subject of narcotics, but after Estelle Murphy assured them that Scott was all right, the conversation turned to narcotics and Scott later joined in. Murphy represented to the others that Scott was her boy friend and he made no objection or correction to this statement. If Murphy had not given Scott an aura of being all right, the subject of narcotics would never have come up (Tr. 453, 457, J.A. 61,63,64). This meeting with the Pannells was not the result of any plan between Scott and Murphy. However, according to Scott, when he worked as a narcotics agent, he was always seeking to "make" cases because that was what he got paid for(Tr. 453, J.A. 62). The conversation relating to narcotics was started by Estelle Murphy (Tr. 461, J.A. 66).

In the course of the conversation, Valeria and Norman Pannell told Estelle Murphy that one "Gatemouth" had been to their apartment around noon the same day. They said that he had one-half ounce of heroin in his possession,

but refused to deliver it to Valeria as she only had $80.00, rather than the $110.00 Gatemouth demanded (Tr. 435, J.A. 52). Appellants said they could not understand they he would not deliver the heroin merely because they were $30.00 short, since they had been dealing with him regularly and he knew he could get money from them. (Tr. 435, J.A. 52). (Appellants' objection to the reference to prior regular dealings was made and overruled at this point.) Scott then said that he did not have connections and expressed a desire to purchase heroin himself. He stated he would be glad to pay the $110.00 for one-half ounce of heroin or to go in with appellants and pay whatever part Norman wanted Scott to pay. Norman then asked Scott to give him $35.00. Scott then gave Norman $35.00 of previously-listed government funds. Norman then attempted to make a phone call and asked for "Gate." (Tr. 435, J.A. 52, 53.)

Norman then told Scott that Gate's wife had told him over the phone that Gate was not in. Norman made another phone call and again asked to speak to Gate or "Roachie." After this Norman told Scott that he was unable to reach Gate or Roachie, but that he knew where he could find them and would take a taxi to do so. Norman then left the apartment on Holbrook Terrace. Scott stayed behind and continued to talk with Valeria and with Estelle Murphy. Valeria told Scott that Gate was doing her wrong by not letting her get the narcotics for $30.00 less, because Gate knew that she had a habit. Valeria then told Scott that Ellen Phelps was part of the organization and that Phelps did supply heroin and was the brains behind the organization, but that she did not like to make deliveries. Scott, Valeria and Murphy remained in the apartment for about an hour and a half without hearing from Norman Pannell. (Tr. 437, J.A. 53,54.)

Also during the conversation at the apartment, Scott asked Valeria who Gate was. According to Scott, Valeria advised him that Gate had a red Ford automobile and was the father of one of her children. (At this point appellant made a motion for mistrial which was denied.) (Tr. 443, J.A. 56, 57.) Scott also asked Valeria who Roachie was. She replied that Roachie was the son of Ellen Phelps. Prior to January 22, Scott had not seen either Ellen Phelps or Roachie (Tr. 444, 445, J.A. 57.)

At about 6:50 P.M. the telephone rang. After answering it, Estelle Murphy gave the phone to Scott. At the other end, Norman Pannell told Scott that he had not been able to locate either Gate or Roachie. The phone was then given to Valeria. Scott told Valeria to tell Norman to wait about another half-hour and if there were no results to return to the apartment where they were waiting. Valeria relayed the message to Norman and then hung up the phone. Since Norman did not arrive by 7:20 P.M., Valeria made a phone call. After the call, Valeria told Scott that Roachie said that Norman was "well." (According to Scott, the term "well" indicates that a person has satisfied the desire for narcotics.) (Tr. 438, 439, J.A. 54, 55.)

Valeria then offered to take Scott where she thought Norman was. Valeria, Estelle and Scott got into the car and Valeria told Scott to drive to 701 24th Street, N. E. When they arrived at that address, Valeria got out of the car and went inside. In five minutes she returned and said that Norman was not there. They then returned to 1246 Holbrook Terrace. When they arrived, Norman Pannell was inside Murphy's apartment. Norman and Valeria, Murphy and Scott went into the bedroom of the apartment where Norman provided Scott with 41 capsules of white powder. After this, Scott took Norman, Valeria

and the special employee, Murphy, to 701 24th Street, N. E. At that address Valeria and Norman got out of the automobile. Scott then drove Estelle Murphy back to her residence and from there drove to the Bureau of Narcotics office. Scott then secured the 41 capsules in a lock-seal envelope in the office safe. The next morning the evidence was weighed, sealed in an evidence envelope and turned over to agent Wurms for delivery to the chemist. According to Scott, no written order form was given for the capsules and there were no Internal Revenue stamps on them. (Tr. 440, 441, J.A. 55,56.)

According to William T. Butler, the Bureau of Narcotics chemist, the 41 capsules Scott had obtained from appellant Norman were a mixture of mannitol and heroin hydrochloride, a derivative of opium and a narcotic drug (Tr. 875).

Agent Samuel J. Reed testified that on February 15, 1962 he saw co-defendant Charles Matthews drive to 701 24th Street, N. E. where he picked up Valeria Pannell and drove her to the vicinity of the Benco Shopping Center at East Capital Street and Benning Road (Tr. 565, 566, 570, 571, J.A. 70, 71, 72).

With respect to the charges against defendant Matthews in Counts 2, 3 and 4, Clinton Johnson testified that he obtained narcotics from Matthews and delivered it to agent Scott on December 21, 1961. As to Counts 5, 6 and 7, there was testimony that Doris Gardiner transferred narcotics to Thomas E. Broadnax, Jr., a federal agent. Pursuant to the remaining four groups of three counts each, there was testimony that Doris Gardiner transferred narcotics to agent Broadnax on January 26, February 8, February 20 and February 21, 1962. Over objections as to voluntariness, a statement

of Gardiner's was introduced (Tr. 1288, J.A. 78) which contained admissions that she was engaging in the narcotics traffic with Matthews, Phelps and Henry. On several occasions, the trial court instructed the jury that the statement was not admissible against defendants other than Gardiner. During a hearing outside of the jury's presence, the defense contended that the statement had been the product of promises of leniency by the prosecution.

After testimony had been taken out of the jury's presence on the circumstances under which written statement (Government Exhibit 15) was taken from co-defendant Gardiner, counsel for all parties including appellants, objected to the admission of the statement and also moved that any reference to defendants other than Gardiner be deleted from the statement if admitted (Tr. 1251, 1260, 1266; J.A. 75, 76). At the point where the prosecution offered Exhibit 15 into evidence, counsel for appellants moved for a severance and for a separate trial for appellants (Tr. 1283, 1284, J.A. 76, 77). Appellant later renewed this motion (Tr. 1295, J. A. 82).

Motions for judgment of acquittal on grounds of insufficiency of evidence and on grounds that entrapment had been established as a matter of law were made by appellants and denied by the trial court (Tr. 1349, 1361, 1362, J.A. 83). Appellant Valeria renewed her earlier motion for mistrial and made a separate motion for severance based on the remark by agent Scott that Valeria had had a child by co-defendant Matthews. The trial court also denied these motions (Tr. 1363, J.A. 84). At a bench conference where counsel for the government and for the defendant Roland Henry mentioned the appearance of articles in the local newspapers referring

to defendant Henry, counsel for appellants renewed his motion for severance which was again denied by the court (Tr. 1468, J.A. 86). Counsel for appellants' then rested their case without presenting evidence (Tr. 1903, J.A. 184).

At the conclusion of the trial court's charge to the jury the following objection was made (Tr. 2078, J.A. 230):

> MR. FIRST: I have one comment on the instructions. Your honor did not mention there was no presumption of guilt in the case of Valeria Pannell on the substantive charges because she did not have possession of it.
>
> THE COURT: I don't have to tell them that. I told them about the presumption of innocence.

The record also contains a handwritten note to the court filed October 12, 1961, from the jury during its deliberations which stated: "May we have the testimony with regard to Norman and Valerie (sic) Pannell." A document also filed October 12, relates that the court had the testimony read to the jury in the presence of counsel.

The jury found appellants not guilty of conspiracy but guilty under Counts 8, 9 and 10 of the Indictment.

STATUTES AND RULES INVOLVED

Title 21, United States Code, Section 174:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, § 105, 70 Stat. 570.

Title 26, United States Code, Section 4704(a):

Packages

(a) General requirement. - It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, United States Code, Section 4705(a):

Order forms

(a) General requirement. - It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is

sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Rule 8 of the Federal Rules of Criminal Procedure, 18 U.S.C.:

Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure, 18 U.S.C.:

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder or offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT OF POINTS

I.

The trial court should have granted appellants' motions for severance.

II.

The trial court erred in denying appellants' motions for a new trial since the verdicts were contrary to the weight of the evidence.

III.

The trial court erred in denying appellants' motion for judgment of acquittal at the close of the government's case on the grounds that entrapment had been established as a matter of law.

IV.

The trial court erred in failing to sustain appellants' objections to testimony in the case in chief by agent Scott as to alleged prior regular dealings in narcotics with a co-defendant.

V.

The trial court erred in failing to remedy the prejudice that resulted to appellant Valeria Pannell from prejudicial remarks volunteered by the government narcotics agent.

SUMMARY OF ARGUMENT

I.

The joinder of appellants with other defendants who were accused of unrelated sales of narcotics would not have been proper initially were it not for the fact that a conspiracy count was also joined with the twenty-one counts of substantive violations. The government failed to establish proof of the conspiracy charged. Under these circumstances, the court should have been particularly sensitive to the possibility of prejudice to appellants arising from the joinder with other defendants. In any event, the prejudice resulting from the long and involved trial, on issues unrelated to appellants, in which their accuser also testified against the other defendants, and where these other defendants had confessed to the unlawful sales of which they were accused, was more than sufficient to require a severance of appellants from these other defendants.

II.

The verdicts were contrary to the weight of the evidence since the evidence is more consistent with the theory that appellants were acting as purchasing agents for narcotics agent Scott. Throughout the alleged transaction they were acting on his behalf in an effort to procure from other sources the heroin which Scott had requested them to procure and for which he had given them the money with which to purchase it.

III.

Since the record showed that agent Scott had no basis for a reasonable suspicion that appellants had engaged in selling narcotics

and there was no evidence of a predisposition in the minds of appellants to sell narcotics, the solicitation of a sale by agent Scott constituted sufficient evidence to establish entrapment as a matter of law. Therefore, the trial court was in error in ruling that appellants would be required to put on additional evidence in order to establish their defense of entrapment.

IV.

The trial courts failure to sustain an objection to testimony by agent Scott concerning alleged prior regular dealings in narcotics which were not charged in the indictment was sufficiently prejudicial to warrant reversal of appellants' conviction.

V.

The prejudicial effect of a statement made by agent Scott regarding the paternity of one of Valeria Pannell's children was so strong as to have required the trial court to grant a mistrial as to her.

ARGUMENT

I.

THE TRIAL COURT SHOULD HAVE GRANTED APPELLANTS' MOTIONS FOR SEVERANCE.

After the principal part of the government's testimony had been presented and at a point where an incriminating statement by co-defendant Doris Gardiner had been offered into evidence by the government, appellants' counsel approached the bench and made motions for severance (Tr. 1283-1284 J.A. 76,77). Appellants' motions,however, were denied. The motions for severance were again made after the government finished its case in chief and after the court had heard and denied a motion for acquittal on the conspiracy count on behalf of all of the defendants. (Tr. 1363, J.A. 84) Appellants submit that these motions for severance should have been granted and that the failure of the trial court to do so adversely affected substantial rights of the defendants and would therefore warrant a reversal of the judgment.

The indictment in this case charged seven defendants with a conspiracy to violate two federal narcotics laws in count one and alleged thirty-three overt acts pursuant to that conspiracy. Of these, appellants were only alleged to have participated in three. The remaining twenty-one counts of the indictment charged substantive violations by various combinations of the defendants. The counts are in groups of three for each alleged transaction, each of the three counts alleging the violation of a different narcotics law. Of the seven transactions alleged, appellants

are charged with only one, a transaction on Jaunary 22, 1962, which serves as the basis for Counts 8, 9 and 10. Charged with them in these counts' are Charles Matthews, Ellen Phelps and Roland Henry, but not Doris Gardiner or Clinton Johnson, the other two defendants in the conspiracy count.

Counts 2, 3 and 4 charged Clinton Johnson and Charles Matthews with an alleged sale of narcotics on December 21, 1961, but contain no charges against the appellants, or any of the other defendants. Counts 5, 6 and 7 charge only Doris Gardiner and Charles Matthews with a sale on January 11, 1962; Counts 11 through 22 charge Doris Gardiner, along with Charles Matthews, Ellen Phelps and Roland Henry with four sales, on January 6, February 8, 20 and 21, 1962. In none of these counts are either Norman or Valeria Pannell charged.

Moreover, in none of the twenty-one counts alleging substantive violations is there any allegation that the appellants and Doris Gardiner or Clinton Johnson participated in the same act or transaction or same series of acts or transactions. Therefore, the initial joinder of appellants with Doris Gardiner and Clinton Johnson would not have been proper under Rule 8(b)[1/] of the Federal Rules of Criminal Procedure, if there had not also been the additional joinder of the conspiracy count. Ward v. U. S., 110 U. S. App. D. C., 136, 289 F 2d 877 (1961).

1/ Rule 8(b) provides:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Without the conspiracy count, the indictment would have had to have been divided into at least three separate indictments because of the lack of relationship between the transactions involving Clinton Johnson, Doris Gardiner and the appellants. However, with the conspiracy count as the connecting link, the government was in a position to avail itself of the many advantages afforded to the prosecution by the trial of defendants en masse. See 72 Harv. L. Rev. 978 (1959).

While the allegations of the conspiracy count of the indictment may have justified the initial joinder of the seven defendants, it should have been apparent to the trial court by the time that the motions for severance were made that the conspiracy alleged in the indictment had not been proven. Viewing the evidence in the light most favorable to the government's case, the most that could be said for the evidence of conspiracy is that it showed the existance of three separate conspiracies, one of the appellants with Matthews, Phelps and Henry, a separate one of Doris Gardiner with these three individuals, and possibly a third involving Clinton Johnson. The situation here was almost identical to that in Kotteakos v. U. S.,328 U.S. 750, 66 S. Ct. 1239 (1946) where the various defendants had all delt independently with one of the defendants in fraudulently obtaining loans under the National Housing Act, and of that in Schaffer v. U. S., 362 U.S. 511, 80 S. Ct. 945 (1960) where each group of defendants had obtained the stolen goods which they were accused of unlawfully transporting from a common source.

Since these separate conspiracies were not the one alleged in the indictment, the trial court should have directed the verdict in regard

to the conspiracy count as requested by the defendants. Had the court done so then this case would come precisely within the framework of Schaffer v. U. S., supra.

Under these circumstances, the full force and effect of the following admonition of the Supreme Court in that case would have been brought to bear in this case:

> We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. Where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, the trial judge should be particularly sensitive to the possibility of such prejudice. 2/

However, the failure of the court to grant the motion for direct verdict on the conspiracy count is not of controlling significance here, inasmuch as a severance does not turn exclusively upon the impropriety of the joinder under Rule 8(b). Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

However, the failure of the conspiracy count alleged, since it thereby eliminates the initial excuse for joinder, should lessen the degree or amount of prejudice that would have to be shown to justify a severance.

The underlying rationale of Rule 14 is to preclude serious prejudice to defendants who are joined or lumped together with many others, regardless

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2/ 362 U.S. at 516, 80 S. Ct. at 948.

of the amount of involvement charged against them and regardless of the amount of evidence relating to each. It also seeks to prevent the harm which results in the tendency of jurors to regard all defendants as being in the same situation merely because they are being tried together. Such prejudice is particularly to be guarded against where the charges include a conspiracy and substantive counts. In our legal tradition, guilt remains individual and personal even with respect to conspiracies and this makes mass trials exceptional to our tradition and requires every safeguard to individualize each defendant in his relation to the mass. Cf. Kotteakos v. United States, supra. See also United States v. Bufalino, 285 F. 2d 408, 418 (2d Cir. 1960). Particularly in trials where there are incriminating statements implicating other co-defendants, the safeguards allegedly provided by limiting instructions are insufficient to ward off all prejudice. Blumenthal v. United States, 332, U. S. 539, 559, 68 S. Ct. 248, 257 (1947). See also Hale v. United States, 25 F. 2d 430, 438, (8th Cir. 1928). Thus, Judge Learned Hand has characterized an instruction directing the jury to disregard the reference to a co-defendant in a portion of an incriminating statement as "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." Nash v. United States, 54 F. 2d 1006, 1007 (2d Cir. 1932). Thus, a conspiracy trial of multiple defendants presents at least two serious dangers. First, it permits introduction of many declarations and otherwise hearsay statements which are used against all conspirators if in furtherance of and during the course of a conspiracy. This is true even though it turns

out at the end of the trial that the government's case of conspiracy was weak or non-existent. Secondly, it permits the introduction of statements of an incriminatory nature which implicate co-defendants and forces the defendants implicated to rely upon the impossibility of the jury's eliminating the adverse contents of the statements from their minds at the instruction of the court. The case at bar is an apt illustration of the effect of these two dangers.

The prejudice to the appellants being tried for the substantive offenses charged in Counts 8, 9 and 10 in the same trial in which Doris Gardiner was being tried for the substantive offenses she was charged with and in which Charles Matthews was being tried for having engaged in an unlawful sale of narcotics with Clinton Johnson [3/] is readily apparent from an examination of the record.

The entire transcript of the trial is well in excess of 2,000 pages of which only about 50 related to the transaction on January 22, 1962, which is the only one involving the appellants. While the trial took over a period of sixteen trial days extending from September 17, 1961, through October 10, 1961, all of the evidence regarding the Pannells was presented within a period of a couple of hours on September 20, 1962, twenty calendar days before the case went to the jury. That the jury's memory of this testimony had been dimmed by the passage of time and the intervention of the unrelated testimony regarding Doris Gardiner is apparent

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3/ Prior to trial Clinton Johnson pleaded guilty to one of the counts against him and during the trial testified on behalf of the prosecution against Matthews (J.A. 12, 29).

from the fact that the jury requested that the transcript of this testimony be read to them during their deliberation. Under these circumstances it can hardly be said that the appellants were given a fair and speedy trial.

Prejudice was also apparent from the adverse effect of having the only government witness who testified against the appellants, narcotics agent Scott, also testifying before the jury as to transactions involving the other unrelated defendants. By testifying as a surveillance witness against Doris Gardiner, and as the purchasing agent in the transaction involving Clinton Johnson, both of whom had admitted, either in court or in a signed confession, that they had engaged in the unlawful transactions with which they were charged, agent Scott no doubt gained considerably from the view point of the credibility of his testimony, over the impression that the jury would have had if his testimony had been restricted to only that involving the appellants.

There is, of course, also the prejudice of the "guilt by association" of being named as defendants along with the self-confessed sellers of narcotics, Doris Gardiner and Clinton Johnson.

At the point in the trial where the motions for severance were made, most of the prejudice referred to above had already occurred. On this basis the trial court should have granted a separate trial to the appellants on the substantive offenses charged in Counts 8, 9 and 10 of the indictment. Schaffer v. United States, supra; United States v. Decker, 51 F. Supp. 20 (D. Md. 1943).

II.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR A NEW TRIAL SINCE THE VERDICTS WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE.

One of the grounds of appellants' motions for a new trial was that the verdict was against the weight of the evidence. The trial court, however, denied these motions. This ruling constitutes reversible error, since as the record makes plain, the evidence is more consistent with appellants acting as purchasing agents of agent Scott then as perpetrators of the crimes charged.

The evidence showed that agent Scott went to special employee Murphy's apartment at Holbrook Terrace and offered to pay all or part of the price of one-half ounce of heroin, which appellants were supposed to obtain from defendant Matthews. According to Scott's testimony Norman took the $35 and after a number of phone calls, Norman later returned with 41 capsules and delivered them to Scott.

Thus, appellants were acting throughout on Scott's behalf and not on their own with respect to these 41 capsules. There is no evidence as to how or where the capsules were obtained. Moreover, it is clear there would not have been a transfer to Scott had he not supplied the money and requested it. The facts are quite similar to the facts in Adams v. United States, 220 F. 2d 297 (5th Cir. 1955). In that case the government informer had met the defendant at a gatheringin the informer's apartment where the informant and the defendant took heroin. Two weeks later the informant again met defendant at her apartment. Defendant

said she would see her connection in order to get some heroin. A government agent then searched the informant and gave him $50. The defendant delivered 10 capsules to the informant for $50. The next day the defendant lent the informer two capsules after the informant had given the defendant opium. At the next meeting defendant gave the informant 6 capsules for $40, $5 more than the standard price. With respect to the inferences to be drawn from the above facts, the 5th Circuit Court of Appeals stated at page 299:

> All of the evidence was quite consistent with the appellant's acting only as a purchasing agent or messenger instead of as a seller.

Judgment was then reversed and the trial court directed to enter a judgment of acquittal. Similarly, in the instant case, there was no expectation of any transaction between Scott and appellants until Scott requested that they obtain a certain amount of narcotics for which he would pay. In obtaining the heroin for the government agent, appellants were at most merely acting as conduits of supply or messengers. The degree of control Scott exercised over the obtaining of the drugs was illustrated by Scott's own testimony that he told Valeria to tell Norman to wait about another half-hour and if they were unable to make contact with the source, he was to return to the apartment (Tr. 438, J.A. 54). In cases such as this there is a critical need to distinguish the true seller of narcotics from his own supply from the person who acts as a go-between to fill a particular request at a particular time made by a government agent. Cf. United States v. Sawyer, 210 F. 2d 169 (3d Cir. 1954). This is true whether or not the charge involves that of a sale or the facilitation of a sale. United States

v. Prince, 264 F. 2d 850 (3d Cir. 1959); United States v. Moses, 220 F. 2d 166 (3d Cir. 1955). The record here clearly establishes that Scott requested narcotics and that appellants did not obtain it or give it to him from their own supplies, but made a special errand or trip to reach a source. When the source was reached, the narcotics were obtained and delivered to the government agent. Thus, to whatever extent the evidence indicates appellants took part in the transfer of narcotics, they did so as agents acting on behalf of Scott. The guilty verdicts against appellants, therefore, should not have been allowed to stand.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE ON THE GROUNDS THAT ENTRAPMENT HAD BEEN ESTABLISHED AS A MATTER OF LAW

At the close of the government's case in chief, counsel for appellants below made motions for judgments of acquittal. It was argued that entrapment had been established as to both appellants as a matter of law, based on evidence put forth in the government's case. (Tr. 1361, J.A. 83.) The District Court denied these motions and stated that it would be defendant's obligation to put on additional evidence in order to establish this defense of entrapment (Tr. 1362, J.A. 83). Appellants submit that the trial court's ruling on these motions constituted reversible error.

The basic philosophy underlying the doctrine of entrapment is that the state cannot tolerate having its officers who are charged with the duty of enforcing the law, instigate crime by implanting criminal ideas in

innocent minds and thereby bringing about offenses that otherwise would never have been perpetrated. The controlling question in all criminal trials where the doctrine of entrapment is invoked is whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged defense which is a product of the creative activity of its own officials. Sorrells v. United States, 287 U.S. 435, 451, 53 S. Ct. 210, 216 (1932). Where evidence of solicitation of criminal conduct by government officials appears in a case, the issue of entrapment arises. United States v. Moses, supra. Before government officials may invite a person to engage in any particular line of criminal behavior, they must have reasonable suspicions that this person is engaging in that particular line of conduct. Childs v. United States, 105 U.S. App. D. C. 342, 267 F. 2d 619, 620 (1958). Where examination of the evidence presented by the government revealed that entrapment had been established as a matter of law, an appellate court may reverse on that basis, whether or not the defendant had presented any evidence relating to the entrapment issue. Sherman v. United States, 356 U.S., 369, 78 S. Ct. 819 (1958). Application of these basic principles to the evidence in the instant case shows that the trial judge erred in denying appellants' motions for judgment of acquittal.

Analysis of the government's proof reveals that entrapment is established for the following three reasons: First, the record is clear that the government official Scott had no basis for a reasonable suspicion that appellants had engaged in selling or facilitating the sale of narcotics to others. Secondly, there was no evidence that appellants were predisposed in their own minds to make sales or to facilitate sales to third parties. And

third, the government agent Scott admitted on the witness stand that he is paid to "make" cases of narcotics law violations.

With respect to the information possessed by Scott concerning appellants, the record makesclear that he had no reasonable suspicion that they were engaging in the sale or facilitation of the sale of narcotics to third parties. The transaction of January 22 began in the apartment of Estelle Murphy, a "special employee" of the Bureau of Narcotics, with whom agent Scott worked on about fifty per cent of his cases in the Washington, D. C. area (Tr. 452, J.A. 61). Scott had never met the appellants before this date, nor had either Scott or Murphy mentioned appellants' names before their arrival at the apartment. At first, appellants were reluctant to discuss the subject of narcotics; but after Estelle Murphy assured the appellants that Scott was all right Estelle turned the conversation to narcotics. (Tr. 457, 461, J.A. 63, 66). According to Scott's testimony, the appellants later pointed out that one "Gatemouth" had some heroin which he refused to deliver to them without payment of the full price (Tr. 434, J.A. 52). This statement by appellants, of course, would be evidence that they had tried to obtain narcotics from Gatemouth for themselves but it had no bearing whatsoever on whether or not the appellants would be willing to make a sale to a third party. The most logical inference from the evidence would be that appellants were addicts who had obtained narcotics for their own private use. Despite this lack of reasonable suspicion, however, agent Scott suggested that they obtain narcotics and deliver them to him, thus deliberately instigating a new type of activity. After Scott had created this idea in the minds of appellants

and they had gone along with the suggestion of the government agent, they find themselves prosecuted for selling or facilitating the sale of these narcotics to the agent.

Moreover, with respect to the mental state of appellants, there was no evidence in the record of a predisposition to deal in narcotics with third parties. Agent Scott testified to no prior acts of such a nature on the part of appellants. Appellants were complete strangers to Scott until January 22. There is no evidence of any later dealings by appellants with third parties. Thus, it can be said that the record positively indicates the absence of predisposition to deal with third parties on the part of appellants. The transaction testified to by Scott on January 22 stands forth as the sole product of Scott's creative activity.

The conclusive indication that the transaction of January 22 was the result of entrapment stems from agent Scott's admission on the witness stand that he was always interested in "making" cases because that was what he got paid for (Tr. 453, J.A. 62). This evidence from the agent's own mouth clearly establishes that his purpose in discussing narcotics with appellants and in inducing them to obtain some for him despite the fact that they were complete strangers, was to instigate crime and "make" a case against appellants. This is the very conduct by government officials which must not be tolerated by the courts. The evidence indicated this was the first occasion in which appellants had dealings with third parties concerning narcotics. But for the agent's solicitation, this transaction would not have occurred. Since entrapment was established as a matter of law by the government's own evidence, the trial court committed reversible error in denying appellants' motions for judgments of acquittal on that basis at the close of the government's case.

IV.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN APPELLANTS' OBJECTIONS TO TESTIMONY IN THE CASE IN CHIEF BY AGENT SCOTT AS TO ALLEGED PRIOR REGULAR DEALINGS IN NARCOTICS WITH A CO-DEFENDANT.

In the course of presenting its evidence against appellants, government agent Scott took the stand and testified concerning the events of January 22, 1962. In reporting an alleged conversation between the appellants, Scott testified that they had discussed the fact that they could not understand why Matthews would not deliver heroin because appellants were only $30 short of the amount asked for. According to Scott, appellants also said they had been dealing with this man regularly, and that he knew that he could get money from them. (Tr. 435, J.A. 52). Counsel for appellants below immediately objected to any reference to prior regular dealings on the part of appellants. The trial court, however, overruled his objection. This ruling constituted reversible error.

Clearly, the so-called "regular dealings" attributed to appellants were not charged in the indictment in this case. Nevertheless, evidence as to them appeared in the government's case in chief. The effect, therefore, is to make the defendants look like "bad" people and thus more likely to be guilty of the substantive charges. However, evidence of this kind is not relevant to any of the transactions charged in the indictment between Scott and appellants. In situations such as this, the testimony by Scott not only does not advance the government's case but also seriously harms the chances of appellants for an unprejudiced and unbiased hearing by the jury. As this court has pointed out in Harper v. United States, 99 U.S.

App. D. C. 324, 239 F. 2d 945, 946 (1956) "* * * evidence of other offenses always carries with it the danger of undue prejudice." Even in rebuttal of some legitimate issue in the case, the government may not have an agent testify as to a prior narcotics offense where it is so prejudicial as to outweigh any probative value. Hansford v. United States, 111 U.S. App. D. C. 359, 303 F. 2d 219, 226 (1962). A fortiori, where such prejudicial evidence has no probative value and is introduced in the government's case in chief where it penalizes a defendant's right to remain silent, the failure to sustain a defendant's objection to such testimony constituted reversible error.

V.

THE TRIAL COURT ERRED IN FAILING TO REMEDY THE PREJUDICE THAT RESULTED TO APPELLANT VALERIA PANNELL FROM PREJUDICIAL REMARKS VOLUNTEERED BY THE GOVERNMENT NARCOTICS AGENT

During the direct examination of agent Scott, the prosecutor asked Scott if the witness had asked Valeria Pannell who "Gate" was. At that point agent Scott volunteered the unresponsive answer that Gate had a red Ford automobile and was the father of one of Valeria's children. (Tr. 443, J.A. 56). Upon prompt objection by appellant's counsel to the witness' remark, the court told the jury to disregard the remark. However, appellant's motion for a mistrial was denied. This failure by the trial court to grant the only remedy which would obviate the harm done by the witness' remark constituted reversible error.

The clearly unresponsive and irrelevant nature of the answer of agent Scott, who was no stranger to the courtroom, suggests that the witness was seeking to attack the character of Valeria Pannell, to prejudice her position in the jury's eyes, and thus to bolster his own testimony in relation to her alleged violations of law. The instant case resembles the fact situation in Nalls v. United States, 240 F. 2d 707, 710 (5th Cir. 1957). There an officer was asked what he did when he first saw the defendant. To this the officer replied, "Our department carried a pick-up on him on a warrant held by the Sheriff's office." The trial court there sustained counsel's objection and told the jury to disregard it, but denied counsel's motion for a mistrial. On this point the Court of Appeals stated, "A mistrial was promptly asked and refused. We think that this statement was calculated to influence the thinking of the jury and was likely to induce prejudice . . . ." See also Brown v. United States, 202 F. 2d 474 (5th Cir. 1953). Certainly the trial court's effort to instruct the jury to disregard the remark would require the jury to perform "mental gymnastics" regarded as impossible by Judge Hand in United States v. Nash, supra. Particularly in view of the minimal relationship between appellants and the co-defendants in the trial, the only remedy here would have been a mistrial.

In addition, it is well settled that the government may not attack the character of any defendant until the defendant himself puts his character in issue. Michaelson v. United States, 335 U.S. 469, 69 S. Ct. 213 (1949); Josey v. United States, 77 U. S. App D. C. 321, 135 F. 2d 809, 811 (1943). Thus, whether Scott's statement be viewed as a volunteered prejudicial

remark or as an attack upon appellant Valeria's character, its admission was erroneous and prejudicial.

Agent Scott's apparent leaning toward unresponsive prejudicial answers is further illustrated in the record. On cross-examination by appellant's counsel and at a point of time where there was no specific pending question on shoplifting, agent Scott volunteered the information that Valeria had expressed a desire to go shoplifting with "special employee" Estelle Murphy. (Tr. 456, J.A. 63) Although this answer was not objected to by appellant's counsel, it generated serious prejudice in the minds of the jury and threw further light on the technique employed by agent Scott in answering questions.

It is respectfully submitted that the case against Valeria Pannell should not have been allowed to go to the jury with these two remarks by Scott in the record. The appropriate manner of obviating this would have been to grant a mistrial. At the very least, these two remarks should have been taken into account as one of the many prejudicial elements in the case to reinforce appellants' motions for separate trial.

CONCLUSION

The judgments of conviction for both appellants should be vacated and the case remanded to the District Court for a new trial of the appellants separate and apart from any new trial that might be granted to other defendants in this case.

Respectfully submitted,

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By Appointment of this Court

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